No. 83-906

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD W. (DICK) RYLANDER, SR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In his brief in opposition, respondent does not address the fundamental questions raised in the petition. He does, however, make several assertions that warrant brief response.

Respondent contends that the government failed to establish his ability to comply with the summonses. In so urging, he continually fails to recognize the impact of a summons enforcement order in establishing one's ability to comply. In *United States* v. *Rylander (Rylander I)*, No. 81-1120 (Apr. 19, 1983), slip op. 8, this Court made clear that the enforcement "order, unappealed from, necessarily contained an implied finding that no defense of lack of possession or control had been raised and sustained in that proceeding." The Court also held (*ibid.* (emphasis in original)) that the only defense open to Rylander in contesting the civil contempt proceeding was his "inability to *then*

produce." As respondent admits (Br. in Opp. 3), however, this defense is not available in a case of *criminal* contempt. Thus, if, at the time of the enforcement hearing, respondent had the ability to comply with a valid court order, his failure to do so established his criminal contempt.

As this Court recognized last Term, on this very same record, implicit in the enforcement order is a finding of respondent's ability to comply with that order. *Rylander I*, slip op. 9 n.3. Thus, respondent's assertion here (Br. in Opp. 2) that the government's proof at the contempt trial established that he had previously denied possession of the records does nothing to advance his cause. This Court found such denials to be inadequate (*Rylander I*, slip op. 5 (citation omitted)) ("the District Court was entirely justified in concluding, as it did, that Rylander 'failed to introduce any evidence at the contempt trial' ").[1] Accordingly, it upheld the finding of civil contempt until such time as Rylander "adduces evidence as to his present inability to comply" (slip op. 9). In the absence of any legitimate defense, supported by competent evidence, respondent's criminal contempt was established by his failure to comply with a valid court order.[2]

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[1]See Br. in Opp. 2: "Respondent appeared [at the contempt trial] but did not participate."

[2]Respondent makes the bald assertion that the summonses should not have been enforced because "they were issued during a criminal investigation in violation of defendant's rights" (Br. in Opp. 7). There is no merit to this contention. The investigation was conducted as a joint investigation, one in which both a special agent and a revenue agent conduct an examination. The primary function of the revenue agent is to ascertain the taxpayer's correct tax liability (Tr. 194).

Moreover, Department of Justice records indicate that the Service's recommendation for criminal prosecution of Rylander for willfully failing to file income tax returns for the years 1975 through 1977 was not made until May 22, 1981, long after the issuance of the summonses in this case. Thus, the fact that respondent was subsequently prosecuted has no bearing on the validity of the summonses at issue here. See

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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United States v. *LaSalle National Bank*, 437 U.S. 298 (1978); *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973).

While this challenge to the summonses has no merit, respondent's belated effort to raise it serves to underscore the wisdom of the requirement that defenses to a summons must be raised at the enforcement hearing. *United States* v. *Powell*, 379 U.S. 48, 58 (1964). If respondent's newly claimed defense had a factual basis, and if it were raised and established at the appropriate time, the summonses would not have been enforced and the parties would have been spared the ensuing, protracted litigation. The orderly and efficient functioning of court processes thus requires and fully supports the rule that such defenses may not be raised after the enforcement hearing. *Rylander I*, slip op. 4-5; cf. *United States* v. *Bryan*, 339 U.S. 323 (1950); *United States* v. *Fleischman*, 339 U.S. 349 (1950); see also *United States* v. *Euge*, 444 U.S. 707 (1980).